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Environmental forensics in India –Four years after the National Green Tribunal Act, 2010

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Abstract

In India, the traditional approach to deal with environmental pollution had been criminal sanctions. The very strict evidentiary requirements for criminal conviction often resulted in situations where the polluter walked free. The realization of this was manifested in the form the National Green Tribunal Act 2010. The Act established a tribunal for environmental cases alone where the aggrieved can approach for redress in the form compensation as if in a civil court. It was predicted that the formation of the Tribunal will result in the development of the relatively new field of environmental forensics in India. This is because; both the contending parties will have to prove their claim in the Tribunal for which they will require the help of environmental forensic experts. This study analysed the role of the Tribunal as a driver of environmental forensics in India. More than 100 cases decided by the Tribunal, in the past more than four years, were analyzed as part of the study. It was seen that the major proportion of the cases that came before the tribunal was regarding the environmental clearances given to projects by the Central and State Governments. But, there were also cases where expert opinion was relied upon to decide the compensation. Thus, even though the influence of the Tribunal has not been very profound so far, it did help in improving the stature of environmental forensics in India. Making the people aware of the provisions of the National Tribunal Act, 2010 and preparing a standard protocol for environmental forensic investigations can help improve the situation further for environmental forensics in India.

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1. Introduction

Environmental forensics involves applying scientific principles to deal with the incidents of pollution with an aim to bring the culprits before the law of the land and ensure that he pays according to the provisions of the law, for the damages he has done to the environment. Thus, rigorous environmental forensic investigations are justified only when the law of the land is capable of meting out the required scale of punishment to the guilty. Varghese and Alappat [1] had discussed in detail the reasons for the development of Environmental Forensics in the US and European countries. One major reason they attribute for the development is the existence of strong civil liability legislations in these countries, which make a polluter pay for the damages he make to the environment. In their paper, they have also discussed about the future of Environmental Forensics in India. They had anticipated that the National Green Tribunal Act, 2010 (NGT-2010) [2] which established a tribunal exclusively for environmental cases would usher in the development of Environmental Forensics in India. Now that it is more than four years since the tribunal was established, this study takes stock of its influence on environmental litigations in India and its role as a driver of environmental forensics in India.

2. Environmental Redress Mechanism in India before NGT-2010

The environmental redress mechanism in India can be grouped under the following headings.

2.1. Constitutional provisions

The COI, as it was written, did not have any explicit provisions to protect the environment. But, through the 42nd amendment to the constitution in 1976, protection and improvement of environment was made both a fundamental duty of the citizens and a directive principle of the state policy. But, both these are not legally enforceable and for the same reason, their role in providing redress to environmental wrongs are not of any significance.

Part III of the COI lists the fundamental rights of a citizen. The fundamental rights are legally enforceable. Article 32 of the COI give powers to the Supreme Court to issue writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of the fundamental rights guaranteed under part III. Though this part does not mention anything explicit about environment or pollution, many of the revolutionary decisions in India for protecting environment have come because of this. Article 21 of Part III guarantees the right to life for a citizen. Through a land mark judgment in 1991, (*Subhash Kumar vs State Of Bihar And Ors* (1991) SCC (1)598) the Supreme Court of India held that;

“..Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists.... ”.

The impact of Public Interest Litigations (PILs) in the environmental redress mechanism of the country has been profound. Though there have been many instances of misuse of PIL (*Kalyaneshwari v. Union of India*, (2011) 3 SCC 287, *Raunaq International Ltd v. I.V.R. Construction Ltd* 1998 Supp(3) SCR 421), and the Supreme Court had to come up with a set of guidelines to prevent the misuse [3], its role in ensuring a clean environment has only grown in importance. The closing down of polluting industries on the banks of river Ganga (*M.C. metha v Union of India*, (1987)4SCC463), promotion of CNG vehicles in Delhi (*M.C. Mehta v Union of India* (1998)6SC60, (1998)6SC63, 8SC648, (2001)2SCR698), closing down of polluting industries of Vellore in Tamil Nadu (*Vellore Citizens' Welfare Forum vs. Union of India*, AIR 1996 SC 2715, (1996)5SCC647), can all be attributed to the interpretation given by Supreme Court to the fundamental right to life and the effective use of PIL to defend this right.

2.2. Statutory provisions

Statutes are the written law formally created by governments. In India, the provisions to deal with environmental pollution are implicit in many statutes of the country (The Factories Act, 1948, The Mines Act, 1952, The Industries (Development and Regulation) Act, 1951, The Insecticides Act, 1968, The Atomic Energy Act, 1962, The Motor Vehicles Act, 1939)). India started enacting explicit environmental statutes in 1974 with the Water (Prevention and Control of Pollution) Act. Before the enactment of the environmental statutes, redress was mainly through common law provisions or the relevant provisions of Indian Penal Code (IPC) having sections against the offences like public nuisance (Section 268), Fouling water of public spring or reservoir (Section 277), Making atmosphere noxious to health (section 278), Negligent conduct with respect to poisonous substance (section 284). A major disadvantage of fighting an environmental case under these provisions is the mild punishment even if the offence is proved beyond all reasonable doubt. Criminal Procedure Code (CrPC), Sections 133 to 144 of the CrPC address the issue of public nuisance (*Farzand Ali v. Hakim Ali*, ILR (1915) 37 All 26, 28) which are invoked even now in many cases.

2.2.1 Environmental statutes

The most important environmental statute of India is perhaps the Environment (Protection) Act of 1986[4], though the first is Water (Prevention and Control of Pollution) Act[5]. The Environment (Protection) Act was enacted in the wake of the Bhopal gas tragedy that happened in 1984. The Act clothes the Central Governments with enormous powers to protect and improve the environment. As the Environment (Protection) Act is an enabling legislation which strengthens the hands of central government for coordinating the activities of various central and state authorities established under previous laws and as a number of subsequent rules to protect the environment under various circumstances have its origin attributed to the provisions of the Environment (Protection) Act, and since the penalty for the violators of these rules are specified in the Act, it is often called an umbrella Act.

2.3. Common law provisions

India, like other commonwealth countries, follows the common law system which has its origin in England. The common law principles are derived from the application of natural sense of justice and the dictates of conscience. The common law, when applied in civil cases, is used to provide redress to someone who had to bear wrongful acts known as torts or civil wrongs. The actions brought under tort law are among some of the oldest remedies against pollution in India. The provisions relating to the torts of nuisance (*Radhey Shyam Vs Gur Prasad*, AIR 1978 All 86; *Dhanna Lal vs Chittar Singh*, AIR 1959 MP 240), negligence (*Mukesh Textile Mills Pvt. Ltd. Vs V.H. R. Subramanya Shastri*, AIR 1987 Kant. 87) and trespass can be used to address environmental pollution.

2.4. Other common law principles

Article 141 of the Constitution of India mandates that “the law declared by the Supreme court of India shall be binding on all courts within the territory of India.” Thus, the legal principles adopted by the Supreme Court have the status of law in India. Two such principles are important in the context of this study, the ‘Polluter Pay’ principle and the principle of ‘Absolute Liability’. Varghese and Alappat [1] had discussed this in detail.

3. Criminal law vs. Civil law for environmental wrongs

From the foregoing discussions, it is clear that India has many legal provisions to deal with the menace of pollution, both in Civil Law and Criminal Law. But, the use of Civil Law provisions against pollution have been few and far between [6]. Varghese and Alappat [1] identified the time delay encountered by civil cases in Indian courts as the main contributing reason for this. Thus, the environmental redress mechanism in India has been predominantly criminal in nature. It is well recognized that this has not been effective in addressing the environmental issues faced by the country [7]. In criminal cases, it is for the prosecution to establish its case beyond all reasonable doubt. Whereas in civil cases, to succeed it is only necessary for the claimant to prove his or her case

by a preponderance of evidence. The advantage of civil proceedings is the less stringent evidentiary requirements. Thus civil liability has a very important role in protecting the quality of environment. Perhaps civil liability cases relating to the environment have the largest potential for the application of environmental forensic techniques. In this context, the formation of the National Green Tribunal (NGT) through the National Green Tribunal Act [2] having jurisdiction over all the civil cases involving a substantial question relating to environment (section 14 of NGT Act), was a landmark in the environmental jurisprudence of the country.

4. The National Green Tribunal

A large numbers of environmental cases are pending in courts and their resolution involves understanding complex issues of facts of science and technology. The 17th Law Commission of India, through Report No. 186, recommended the formation of Environmental Courts at State level as courts of original jurisdiction on all environmental issues and also as appellate authorities under the major environmental statutes. These courts were recommended to have technical members also. The recommendation was pursuant to the observation of the Supreme Court in four judgments, viz., *MC Mehta v. Union of India*, 1986 (2) SCC 176; *Indian council of Environmental – legal action V Union of India*, 1996(3) SCC 212; *AP Pollution Control Board v MV Nayudu*, 1999(2) SCC 718; *AP pollution control board v MV Nayudu-II*, 2001(2) SCC 62. The recommendation of the Law Commission together with the reorientation of environmental redress mechanism of the country in conformity with the National Environmental Policy, 2006, led to the establishment of National green tribunal (NGT) on 18th October 2010 under the National Green Tribunal Act 2010 [2]. The NGT is responsible for disposing of the civil case relating to environmental protection in all respect, including enforcement of any legal rights related to environment. With effect from the date of establishment of the NGT, no civil court has jurisdiction to entertain any appeal in respect of any matter which the tribunal is empowered to determine under its appellate jurisdiction (Section 29 of NGT Act). The act is also an endeavor of the Parliament to fulfill the obligation of India towards Stockholm declaration, 1972.

Sections 4, 14, 15, 17, 19 and 26 of the NGT Act are of considerable significance to environmental forensics [1].

5. Cases before the Tribunal

Analyses of cases filed in the tribunal since its inception shows that majority of the cases are related to the environmental clearances granted by the Government to development projects. The Environmental Impact Assessment Notification, 2006 [8] mandates that certain categories of development projects get environmental clearance from the government before the execution start. The disputes related to the no objection certificates granted by the authorities to projects like setting up of new industry, expansion of existing industry, new power plants and the disputes related to the environmental clearance given by the authority to different project like MSW treatment plant, landfills, etc. dominate the case list before the Tribunal. The Table 1 shows the nature of cases handled by the NGT.

Table 1 Nature of case handles by National Green Tribunal (2010-2014)

Type of cases	Percentage
Environmental Clearance & Related	41
Pollution	23
Conservation & Related	19
Others	17

The delay in delivering justice has been a major criticism against Indian judiciary, especially in civil cases. Varghese and Alappat [1] observed delays ranging from 4 to 34 years for the final judgment in civil cases for compensation, after the litigation was initiated in any of the lower courts. The Table 2 shows the case disposal statistics of NGT as on 31-08-2014. This indicates considerable improvement from past.

Table 2 Case disposal statistics of NGT as on 31-08-2014

NGT Benches	No of Cases	Disposed	% Disposed
Principle Bench(2011 to 2014)	2597	2073	79.8
Southern Bench (Nov.2012 to 2014)	1496	574	38.3
Central Bench (April 2013 to 2014)	1091	680	62.3
Western Bench(Aug 2013 to 2014)	387	271	71.1
Eastern Bench (May 2014)	46	15	31

Source: Sanjay Kumar[9]

6. Green Tribunal as a driver of Environmental Forensics in India

Though one may not find the explicit usage of the terms ‘environmental forensics’ in any of the judgments delivered by the Green Tribunal, cases where the Tribunal has recommended environmental forensic investigation are many. So are the cases where the Tribunal has relied on the results of environmental forensic investigations to deliver its judgments.

In *Raghunath S/o Rakhamji Lokhane Vs MPWPB& Ors* (Original Application No. 11/2013(THC)(WZ)), the Applicants have demanded restitution of the environment, especially the groundwater environment, polluted by the industries of Waluj industrial area of Maharashtra. While investigations showed pollution of the groundwater system, the individual industries shirked responsibility. The tribunal ordered the Maharashtra Pollution Control Board (MCB), the government agency primarily responsible for monitoring and controlling pollution in the State, to work out the remediation cost with the help of experts and equitably distribute this cost on the polluters after identifying their extent of responsibility in pollution. Clearly, an environmental forensic investigation has to be initiated by MPCB to comply with the order of the tribunal. Similar orders were issued in *Janardan Pharande Vs MoEF and Ors* (Original Application No. 7/2014 (THC) (WZ)) and *Vinesh Madanyya Kalwal Vs State of Maharashtra Ors.* (Original Application No. 30(THC)/2013(WZ)), among others.

In *Himanshu R. Barot Vs State of Gujarat Ors.* (Original Application No. 109/ (THC)/2013), the tribunal had sought the help of the experts from a University to investigate the case of pollution by an industry. Based on their report the industry was made to take actions to prevent pollution. Moreover, the industry was made to pay INR 10,00,000/- being compensation in general to be used for providing public facilities for the population surrounding the industry who were the victims of pollution. But, in *Ramubhai Kariyabhai Patel Vs. Union of India &Ors.* (Application No. 87/2013 (WZ)), the tribunal itself collected relevant records and monitoring data available with various regulatory agencies pertaining to an accident that had happened an year back where hazardous waste was spilled to the environment, and arrived at the best estimate of the damage that could have happened at the time of spill. The operators were made to pay INR 25,00,000/-towards restitution of environment in addition to compensation for farmers.

Along with the many examples of successful use of environmental forensics, one also find cases where failure to take the forensic approach had resulted in the Tribunal not entertaining claims. In, *Godavari Magasvargiya Mastya Vyavsai Sahakari Sanstha Mayradit Vs The Ganga Sugar Energy Ltd. & Ors* (Original Application No. 30/2013(WZ)), the applicants were not granted compensation for their loss of income from fisheries due to the effect of pollution, because their claims were not legally established. Similarly, in *S. Munuswami and Others Vs The Chairman Tamil Nadu Pollution Control Board and Others* (Original Application No. 152/2013(SZ)) the Tribunal did not entertain the Applicants’ request to order the Respondent industry to remediate the pollution as it was not substantiated.

Thus it can be said that the introduction of the National Green Tribunal has created a space for environmental forensics in India.

7. Need for an Environmental Forensic protocol

While going through the judgments given by the Tribunal carefully, one can infer that availability of a standard protocol for environmental forensic investigations would make the work of the Tribunal easier. In *Sukdeo Kolpe Anr Vs M/s Kopargoan Sah. Sakhar Karkhana Ltd.* (Original Application No. 34/2014(WZ)), while deciding if the

groundwater got polluted due to discharge from the Respondent industry, the Tribunal observed that the investigation for this, conducted by the Agency was random and not scientific.

There are efforts going on in other parts of the world to develop a protocol for environmental forensic investigations. The ASTM subcommittee E50.06 was setup in the year 2005 for working towards this aim, though the committee is yet to deliver. The scope of the committee is the development of standards for processes and technologies applied to judicial, private, and/or administrative procedures[10].

Once a protocol is in place, it will be easier to involve private agencies also for environmental forensic investigations. Now, only government institutions are approached to do such investigations, as revealed by the cases decided by the tribunal.

8. Conclusion

The passing of the National Green Tribunal Act was a significant development in the environmental jurisprudence of India. A welcome shift from the traditional approach of Criminal sanctions with strict evidentiary requirements, to a mix of Civil and Criminal sanctions, was made possible by the Act. Another major change was the relatively quick decisions in the Green Tribunal. These improvements have resulted in more people approaching the court for redress. With these developments in the background, the growth of Environmental Forensics in India was analyzed.

In spite of the fact that the numbers of the aggrieved resorting to legal means for claiming compensation in the event of pollution are on the rise, environmental forensics as a field, has not become popular among the Indian scientific community. More number of practitioners can make a difference. For this, private agencies capable of supplying the required expertise should come up. In the current situation, it may not be that easy. Development of a definite protocol for environmental forensic investigations may bring about the required change.

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